FEDERATION REPORTS

PUBLIC PROSECUTOR v. CHEW JIM.

[Ipoh — Criminal Appeal No. 21 of 1950]

[App. Crim. Juris. (Thomson, J.) May 20, 1950]

Opium and Chandu Proclamation, 1946, ss. 3(1) and 18A — Binding over under s. 18A of the Proclamation — When Court can act under s. 18A of the Proclamation — Criminal Procedure Code, s. 294.

In this case the respondent was convicted on a charge of unlawful possession of chandu in contravention of section 3(1) of the Opium and Chandu Proclamation. The learned President of the Sessions Court made an order that the respondent be "bound over under section 18A". The Deputy Public Prosecutor appealed against that order.

Held, (1) that section 18A of the Opium and Chandu Proclamation is intended to cover the case of a man of good character who is found in possession of opium for his own consumption only and who has been driven to such possession by a pathological craving and it is intended to secure that when such a man escapes punishment he should only do so on condition that he subjects himself to a course of treatment prescribed by the Court on adequate medical advice; (2) that on the facts in this case the respondent was in possession of the chandu for the purpose of trafficking and as the amount of chandu was comparatively large, the learned President should have imposed a term of imprisonment.

CRIMINAL APPEAL from Sessions Court, Parit Buntar.

E. N. Griffith-Jones for the appellant.

K. C. Chan for the respondent.

Thomson, J. : —The respondent in this case appeared before the Sessions Court at Parit Buntar on a charge of unlawful possession of chandu in contravention of section 3(1) of the Opium and Chandu Proclamation, 1946. The Court found that the charge was proved and made an order that the respondent be "bound over under section 18A". For what period, in what sum, with what sureties, if any, and subject to what conditions as to treatment for opium addiction the respondent was to be bound over, the order did not mention. The Deputy Public Prosecutor appealed against that order and I had no hesitation in quashing it and substituting for it an order that the respondent be convicted and undergo a sentence of three months' rigorous imprisonment. I said I would state my reasons for the course I took at a later date. I now proceed to do so.

Under section 3(2) of the Opium and Chandu Proclamation the only punishment prescribed for unlawful possession of chandu is imprisonment for a term not exceeding five years. From that it is clear that the legislature intended that the offence should be regarded as one of considerable gravity.

The only cases in which a court may refrain from inflicting a sentence of imprisonment are those which fall within section 294 of the Criminal Procedure Code or within section 18A of the Proclamation.

As regards section 294 of the Criminal Procedure Code, that section provides that binding over may be substituted for imprisonment if it appears to the court that such substitution is "expedient" regard being had to the character, the antecedents, the age, the health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed. As I had occasion to observe in Criminal Appeal No: 38 of 1949, [*See* (1949) M.L.J. 231] "each individual case must be considered on its merits and must be examined with a view to ascertaining whether having regard to any of the matters mentioned in section 294 binding over is in all the circumstances of the case expedient."

Section 18A of the Proclamation provides that where a charge under the Proclamation is proved the court may, instead of proceeding to conviction, bind over the party charged if the following two conditions are satisfied :—

(1) That the Court is of opinion that the accused is an opium addict, by which expression I take it is meant not a person who smokes opium but a person who does so under the compulsion of a pathological liking for it; *and,*

(2) The Court is of opinion that having regard to the character, antecedents, age, health or mental condition of the person charged or to the extenuating circumstances under which the offence was committed (but not, it is to be observed, the trivial nature of the offence) it is inexpedient to impose a punishment or any other than a nominal punishment.

Presumably to assist in its application the section goes on to provide that in any case where the Court "suspects" that the accused is an opium addict or where the accused alleges that he is an opium addict the Court *shall* cause the accused to be examined by a Government Medical Officer and may accept the written certificate of such officer as to the existence or not of opium addiction, and as to the duration of treatment sufficient to enable the accused to overcome his addiction.

The meaning of section 18A is very clear. It does not permit the Court to bind anybody over merely because it is of opinion that he is an opium addict.

It only enables the Court to do so when in addition it is of opinion that having regard to the character of the accused or to any extenuating circumstances which may exist and, of course, in the light of the circumstances of the case as a whole it is inexpedient to inflict any punishment. Moreover, the section clearly indicates what steps the Court should take to enable itself to form an opinion as to the existence of opium addiction when it suspects or the accused alleges that such a condition exists.

Having made these observations I proceed to consider the course of the present case. The learned President found the charge was proved, that is to say, he found that the accused was in unlawful possession of a quantity of chandu which amounted to over three ounces of chandu and over thirteen ounces of residue containing chandu. This was found in a detached shophouse. Some of the chandu was made up into twenty bamboo-leaf packets which were in a tin containing $2.50 in cash. There were also found in the same room, in addition to the balance of the chandu, one hundred and seven cut bamboo leaves of the type generally used for packing chandu for retail sale, four patterns for cutting such leaves and a small scales. In his defence the accused had stated on affirmation that he was not a chandu smoker and had last smoked chandu before the war, that is to say, some ten years ago.

As I have said, the learned President found the case was proved. From the circumstances I have mentioned it was clear that the chandu of which he had found the accused to be in possession was in his possession for the purpose of trafficking, and there was not the slightest reason to suspect that the accused was an opium addict. The case could not by any conceivable stretch of the imagination fall either within section 294 of the Criminal Procedure Code or within section 18A of the Proclamation. It therefore became the duty of the learned President to impose a sentence of imprisonment of what he considered suitable length having regard to the gravity of the offence as estimated by him, and to the necessity in the public interest for providing a deterrent to other offenders. Instead, however, of doing his duty, for reasons which he has failed to record he adjourned the case for a week until 7th March, 1950.

When the case came before the Court on 7th March, that is seven days later, a piece of paper was produced which purported to come from a non-Government hospital and which bore the following words :—

"6th March, 1950.

To Whom It May Concern:

This is to certify that Chew Jin of No. 449, Coast Road, Kuala Kurau was an opium addict and was under my treatment from 2nd to 6th of March, 1950. He has now been discharged from the hospital.

Yours faithfully,

Dr. .....

Medical Officer."

If that certificate related to the accused, a man who had not on his own showing smoked opium for about ten years, it should have given rise to the interesting reflection that within two days of the Court having found that he was in possession of the stuff and so liable to imprisonment for five years and while the threat of that penalty was still hanging over his head, he had taken to smoking it so extensively as to become an addict. Moreover, the fact that he had subjected himself to treatment for a period of four days only might have been taken as suggesting that he was not unduly concerned to be rescued from the condition into which he had so suddenly and inexplicably fallen. These reflections, however, do not appear to have occurred to the learned President. Instead of disregarding the certificate or treating it as grounds for suspecting that the accused was an addict and so for having him examined by a Government medical officer as required by the Proclamation he proceeded to make an order that he should be bound over under section 18A. In his Grounds of Judgment he said: "The case appeared to me to be exactly the type with which section 18A of the Proclamation was intended to deal, as there appeared to be a reasonable chance of his being cured of his addiction".

The learned President was wrong, and grievously wrong, in four respects.

In the first place he was wrong in treating the certificate I have quoted as grounds for forming an opinion that the accused was an addict. At the very most it was grounds for a suspicion to that effect.

In the second place he was wrong in thinking that there was any chance, far less any reasonable chance, of the accused being cured of his alleged addiction. That the accused had even contemplated the desirability of such a cure is completely negatived by the fact that he subjected himself to treatment for four days only.

In the third place he failed to obtain any medical guidance, as he was required by law to do, as to the duration of treatment sufficient to enable the accused to overcome his addiction, a point on which he was required by section 18A (1) (a) to form an opinion on which he might base the conditions to be embodied in the accused's bond.

And in the fourth place, even if the accused was an addict, the case was not one in which binding over was expedient. The case was a clear one of trafficking and in the absence of any mitigating circumstances of the sort described in the Proclamation the necessary conditions were not fulfilled to enable the Court to make an order of binding over.

The learned President has completely misunderstood the purpose of section 18A. That section is intended to cover the case of the man of good character who is found in possession of opium for his own consumption only and who has been driven to such posession by a pathological craving and it is intended to secure that when such a man escapes punishment he should only do so on condition that he subjects himself to a course of treatment prescribed by the Court on adequate medical advice. It is not intended to cover the case of the man who is trafficking. If such an individual does labour under the misfortune of being an addict in the true sense, he can receive all appropriate treatment for that condition while he is undergoing the punishment which his offence has merited.

Appeal allowed.

PHOON LIAT SUM v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Hill, J.) June 3, 1950]

[Ipoh — Criminal Appeal No. 23 of 1950]

Opium and Chandu Proclamation, 1946 — Appeal — Questions of fact — Inferences from the evidence.

In this case the appellant appealed from his conviction and sentence on a charge of possession of opium, an offence under the Opium and Chandu Proclamation, 1946. The learned President of the Sessions Court had found that the appellant was in control of the opium, though he was not in actual physical possession of it.

Held, (1) that where an accused is found in control but not in actual physical possession of opium, it is essential that inferences drawn from the evidence as establishing knowledge in the accused must be correctly construed and that the conclusions inferred must be capable of only one construction, the guilty knowledge of the accused; (2) that in this case some of the evidence on which the inferences were drawn by the learned President of the Sessions Court was capable of a construction equally in favour of the appellant and the benefit of the doubt should have been given to him.

CRIMINAL APPEAL from the Sessions Court, Sitiawan.

J. D. M. Donnelly for the appellant.

E. N. Griffith-Jones for the respondent.

Hill, J. : — On the 24th March, 1950, the appellant was convicted and sentenced to nine months' rigorous imprisonment in the Sessions Court, Sitiawan, on the following charge :—

"That you on 1.2.1950 at about 8.00 p.m. near Customs Office Lumut, did have in your possession Opium, to wit, about 34 lbs., an offence under Sec. 3(1) of Proclamation 49/46 and punishable thereunder."

The appeal was against both conviction and sentence.

In arguing this appeal Mr. Donnelly laid great stress on the impropriety of Mr. Locke conducting the case in the lower Court in view of the fact that he was a witness. The undesirability of this practice is obvious and it has previously been the subject of unfavourable comment by this Court. Unfortunately, for practical reasons, it is generally unavoidable. In certain aggravated circumstances it might well result in a conviction being quashed on appeal, but in the present case under review I do not think that the dual role played by Mr. Locke caused any material injustice.

With regard to the admission of a passage in the statement made by the accused to Mr. Locke, to which exception was taken by Mr. Donnelly, it is clear that the statement was introduced deliberately into the evidence during cross-examination by counsel for the defence and it is equally clear that the learned President was careful to exclude from his considered judgment any weight whatever to this passage. In fact he ignored it.

The written judgment of the learned President delivered by him on the 24th March is typical of the careful decisions we have come to expect from him. Moreover, I am very conscious of the fact that by having the witnesses in front of him in Court he was able at first hand to come to conclusions and draw inferences.

The learned President was satisfied that the appellant was in conscious possession, that he knew he had opium in his possession, and accordingly convicted him. This conclusion was based mainly, if not entirely, on certain inferences drawn from the evidence.

Where an accused is found in control but not in actual physical possession of opium, as the evidence disclosed in this case, it is essential that inferences drawn from the evidence as establishing knowledge in the accused must be correctly construed and the conclusions inferred must be capable of only one construction, the guilty knowledge of the accused.

After very careful consideration of the inferences drawn by the learned President, I have come to the conclusion that some, if not all, of them do not stand up to this test. Some of the evidence on which they were based was capable of a construction equally in favour of the accused.